Supreme Court, U.S.
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No. ____

IN THE

Supreme Court Of The United States

Rex R. Sprietsma, Adm'r of the Estate of
Jeanne Sprietsma, Deceased,

Petitioner,

v.

Mercury Marine, a Division
of Brunswick Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the same issue raised by *Lewis v. Brunswick Corp.*, No. 97-288 (October Term, 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether common law tort claims that a boat was defectively designed because it lacked a propeller guard are preempted by federal law. In *Lewis*, the United States submitted an *amicus curiae* brief stating the federal government's view that such claims are not preempted. *Lewis*, however, settled after oral argument, before any decision was rendered. This case presents the first meaningful opportunity for the Court to consider this preemption issue since *Lewis*. The question presented is:

Whether the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. 1993), preempts state common law claims that a recreational motor boat was defectively designed because it lacked a propeller guard when: (1) the Act expressly provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law" (46 U.S.C. § 4311(g)); (2) the U.S. Coast Guard has never adopted any standard or regulation with respect to propeller guards; and (3) the United States has taken the position that common law no-propeller-guard claims do not conflict with or otherwise frustrate any federal statutory or regulatory purpose?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner Rex R. Sprietsma, Administrator of the Estate of Jeanne Sprietsma (as appellant) and respondent Mercury Marine, a Division of Brunswick Corporation (as appellee).

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OPINIONS BELOW

The opinion of the Illinois Supreme Court (App. 1-22) is reported at 197 Ill.2d 112 (2001). The opinion of the appellate court (App. 23-38) is reported at 729 N.E.2d 45 (2000). The unreported order of the trial court (App. 39) was entered on November 20, 1998.

JURISDICTION

The decision of the Illinois Supreme Court was filed on August 16, 2001. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The express "preemption clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4306 (1988), reads as follows:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

The express "savings clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4311(g) (1988), reads as follows:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

The Coast Guard has not issued any regulations governing propeller guards on recreational vessels. The agency considered developing a regulation requiring propeller guards on all recreational boats, but it decided not to do so. The Coast Guard's decision not to take any regulatory action with respect to such devices was not the subject of any formal rulemaking.

STATEMENT OF THE CASE

This case presents the question of whether a state common law claim that a boat engine was defectively designed because it lacks a propeller guard is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. 1993) ("Boat Safety Act" or "Act"), and by a decision of the United States Coast Guard not to begin developing a regulation that would have required the use of propeller guards on all recreational motor boats. The Illinois Supreme Court held that such claims are impliedly preempted by federal law, even though the Coast Guard has never regulated propeller guards and even though the United States, in an *amicus curiae* brief filed with this Court in a case that was settled after oral argument, took the position that no-propeller-guard claims like petitioner's are not preempted by federal law. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288). In so doing, the lower court disregarded repeated teachings of this Court that the federal government's own view of the preemptive effect of agency regulations is entitled to "susbstantial weight." *E.g., Medtronic v. Lohr, Inc.*, 518 U.S.

470, 496 (1996) (majority opinion); *id.* at 505-07 (Breyer, J., concurring). The Illinois Supreme Court's decision, which is in direct conflict with the Texas Supreme Court's holding in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), is the subject of this petition.

A. The Federal Statutory and Regulatory Framework.

1. The Boat Safety Act.

The Boat Safety Act was enacted to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating – presently the Secretary of Transportation." S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333. The Act provides that the Secretary of Transportation "may prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment . . .." 46 U.S.C. § 4302(a)(1). This rulemaking authority has been transferred to the Commandant of the United States Coast Guard. *See* App. 2. The National Boating Safety Advisory Council (the "Advisory Council") is charged with assisting the Coast Guard in evaluating the need for safety regulations. 46 U.S.C. § 4302(c)(4).

Under the Act, the Coast Guard's authority to issue minimum safety standards is permissive, not mandatory. *Id. See also* S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1338. In addition, the Coast Guard is prohibited from establishing regulations that would compel substantial alterations of existing boats unless compliance with

those regulations would "avoid a substantial risk of personal injury to the public." 46 U.S.C. § 4302(c)(2). The Act sets forth the procedures that the Coast Guard must follow to prescribe such regulations, including the actual publishing of a proposed safety standard and the express provision of a future effective date after its initial publication. *See* 46 U.S.C. § 4302(b). Thus the Act

> requires certain actions by the [Coast Guard] in the development of safety standards . . . In addition to the specific procedural requirements outlined in the [Act], the [Coast Guard], in promulgating standards, is required to comply with the formal rulemaking procedures in the Administrative Procedure Act (5 U.S.C. 553).

S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1340. Under this scheme, any party adversely affected by a standard prescribed under the Act is entitled to seek judicial review of the standard in accordance with the Administrative Procedure Act. *Id.*

The Boat Safety Act also contains two provisions addressing the effect of Coast Guard regulations on state law. First, Congress included in the legislation an express preemption clause providing, in pertinent part, that:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated

> equipment . . . that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. Second, Congress included an anti-preemption provision, or savings clause, that expressly preserves all common law claims. It provides:

> [c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C. § 4311(g).

Together, the preemption provision and the savings clause govern the preemptive effect of federal regulations issued pursuant to the Boat Safety Act.

2. The Coast Guard's Decision Not to Regulate Propeller Guards.

In 1988, in response to increasing controversy over – and litigation with respect to – the dangers of unguarded boat propellers, the Coast Guard formed a subcommittee of the Advisory Council that included members of the boating industry and the general public (the "Subcommittee"). The Subcommittee was charged with investigating the feasibility of requiring guards to prevent underwater propeller accidents and opining whether "the Coast Guard should move toward a federal propeller guard requirement." App. 3. In November 1989, based in part on its conclusion that propeller guards "could create other safety concerns" (App. 3), the Subcommittee recommended that the "Coast Guard should take no regulatory action to require propeller guards." App. 3. This

recommendation was then adopted by the Advisory Council and forwarded to the Coast Guard for its consideration. App. 3.

On February 1, 1990, the agency adopted the Advisory Council's recommendation that "the Coast Guard should take no regulatory action to require propeller guards." App. 3. In a letter setting forth the rationale underlying the agency's decision not to begin the formal regulatory process, Rear Admiral Robert T. Nelson explained the Coast Guard's position on propeller guards as follows:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

App. 40. Rear Admiral Nelson added, however, that the agency would "continue to collect and analyze accident data for changes and trends . . . [and] review and retain any information made available regarding development and testing of new propeller guarding devices . . ." App. 40-41.

At no point did Rear Admiral Nelson's letter – or anything else issued by the Coast Guard – indicate that the agency had concluded that propeller guards are dangerous. In addition, although the agency was well aware of ongoing lawsuits filed by a number of propeller-strike victims, *see* Report of the Propeller Guard Subcommittee of the National Boating Safety

Advisory Council, November 7, 1989, at 4, Rear Admiral Nelson's letter contains no indication that the agency ever intended to preempt common law claims relating to a manufacturer's failure to install propeller guards in its boats.

The Coast Guard's 1990 decision not to begin the process of developing a regulation to require propeller guards was not the product of any formal rulemaking proceeding and did not result in any regulatory action. Thus, there was no attempt to conform to the notice-and-comment rulemaking requirements of the Administrative Procedure Act. *See* 5 U.S.C. § 553 (1994). To date, there is still no federal regulation with respect to propeller guards, and their use is neither mandated nor prohibited by federal law.[1]

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[1] The Coast Guard has, however, continued to study various policy proposals to prevent propeller-related injuries. In 1995, for example, the Coast Guard issued an Advance Notice of Proposed Rulemaking ("ANPRM") requesting comment on "the public's present feelings about the use of propeller guards on these vessels," a request occasioned by a serious accident involving a houseboat. *See* 60 Fed. Reg. 25,191 (1995). In 1996, the Coast Guard issued another ANPRM "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 12,123 (1996). And, in 1997, the Coast Guard sought "comments on the effectiveness and interventions which have been suggested for reducing the number of recreational boating accidents involving rented power boats in which individuals are injured by the propeller." 62 Fed. Reg. 22,991 (1997). Because it received few responses to that request, the Coast Guard extended the period for comments. *See* 62 Fed. Reg. 44,507 (1997). To date, the rulemaking is still open, and the Coast Guard is still considering what action, if any, to take with regard to propeller guards. *See* 64 Fed. Reg. 21,566 (1999).

B. The Proceedings Below

This case arose out of a boating accident in Tennessee state waters in which the petitioner's decedent, Jeanne Sprietsma, fell from a motor boat and was struck by the motor's propeller blades. App. 1. As a result, she suffered serious injuries and later died. App. 1. The boat was equipped with a 115-horsepower outboard motor that did not contain a propeller guard. The motor was designed, manufactured, and sold by respondent Mercury Marine, a division of Brunswick Corporation. App. 1, 23.

Petitioner Rex Sprietsma is the administrator of the estate of his deceased wife. App. 1. He filed a wrongful death action against Mercury Marine in the Circuit Court of Cook County, Illinois seeking to recover damages for his wife's pain and suffering, along with the financial losses suffered by him and his son. App. 1. The complaint alleged that the boat engine was defectively designed because it was not equipped with a propeller guard. App. 24.

Respondent moved to dismiss on the ground that Mr. Sprietsma's claims are preempted by the Boat Safety Act and by the Coast Guard's decision not to regulate propeller guards. The trial court granted the motion to dismiss, finding the claims to be preempted. App. 39. The appellate court affirmed, holding that the claims are expressly preempted by the Boat Safety Act. App. 34.

On appeal, the Illinois Supreme Court rejected the appellate court's express preemption ruling, but nonetheless held that petitioner's claims are impliedly preempted by federal law. App. 16. At the outset, the court held that the case is not subject to the strong presumption against federal preemption

that ordinarily applies to health and safety issues – "matters which have traditionally come within the jurisdiction of the state through its police powers." App. 5 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474 (1996)). Relying on this Court's recent decision in *United States v. Locke*, 529 U.S. 89 (2000), which held that the presumption against preemption does not apply to cases involving international maritime commerce, the Illinois Supreme Court declined to apply any presumption against preemption in this recreational boating case on the theory that, "[a]lthough Sprietsma's claims bear upon state and federal concerns, we believe the federal concerns predominate in this case." App. 6.

The lower court then considered the questions of express and implied preemption under the Boat Safety Act. Regarding the former, the court concluded that the Act's broadly-worded savings clause, which provides that "compliance with this chapter . . . does not relieve a person from liability at common law or under state law," precludes any finding of express preemption of common law claims. App. 9-10. The Illinois Supreme Court went on to hold, however, that petitioner's claims are impliedly preempted by federal law because a jury verdict finding Mercury Marine liable for not installing a propeller guard would "frustrate" federal purposes. App. 16. Despite its acknowledgment that the Coast Guard has never issued any regulations governing propeller guards (yet retains the authority to do so if it so chooses), the court found that the agency's regulatory *in*action amounted to an affirmative decision to preclude any common law claims seeking to hold a manufacturer liable for failing to install propeller guards. In the court's view, "[a] damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the [Boat Safety Act]." App. 16 (citations omitted).

In so ruling, the lower court chose to disregard the United States' only articulated view on the matter: the anti-preemption position set forth in the Solicitor General's *amicus curiae* brief in *Lewis*, which argued that "[t]he Coast Guard's conclusion in 1990 that the available data did not justify the issuance of regulations concerning propeller guards *is not a basis for implied conflict preemption of petitioners' common law tort claims*." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 26, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288) (emphasis added). The *Lewis* brief emphasized that "[t]he Coast Guard has never formally determined that a requirement [of propeller guards] would be contrary to the interests of boat safety." *Id.* The United States further noted that,

> [i]f it had reached that conclusion, the Coast Guard may well have prohibited propeller guards. The Coast Guard stated only that the "available propeller guard accident data do not support imposition of a regulation requiring propeller guards."

Id. Given this fact, and the absence of any federal regulation governing propeller guards, the United States concluded that the petitioners' claims did not in any way conflict with the federal regulatory scheme. *Id.* at 25-30.

In the face of these arguments, the Illinois Supreme Court ultimately held that the United States' no-preemption position in *Lewis* was not persuasive because, among other things, "[t]he Solicitor General has not presented his argument concerning the *Lewis* case or the Sprietsma claim to this court." App. 18. This petition followed.

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Same Federal Preemption Issue that this Court Considered in *Lewis*, But Could Not Resolve Because *Lewis* Settled After Oral Argument.

This case presents the same issue of federal preemption that was before the Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether state common law tort claims that a boat was defectively designed because it lacked a propeller guard are preempted by federal law. In *Lewis*, the United States submitted an *amicus curiae* brief arguing that, because the Coast Guard never issued any regulations relating to propeller guards, common law no-propeller-guard claims do not conflict with or undermine any federal regulatory purpose. *Lewis* settled after oral argument, so no opinion was ever rendered in the case. The lower courts remain split on the issue, with one state supreme court (Texas) holding that no-propeller-guard claims are not preempted and a host of federal courts and the Illinois Supreme Court holding just the opposite (*see infra* at II).

The decision below is the first meaningful opportunity for this Court to review the propeller-guard issue in the wake of *Lewis*. The same question was presented in *Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied sub nom. Lady v. Outboard Marine Corp.*, 121 S. Ct. 1402 (2001), but the respondent declared bankruptcy shortly after the petition was filed and the writ was denied. The Illinois Supreme Court's ruling in this case is the first decision on the propeller-guard question rendered by a state high court or federal court of appeals since the denial of review in *Lady*.

Thus, this case presents the first opportunity since *Lewis* for this Court to resolve this important issue of federal law.[2]

II. There is a Direct Split of Authority as to Whether No-Propeller-Guard Claims are Preempted by the Boat Safety Act.

Review is also warranted because there is a direct split between the Supreme Court of Texas and the Illinois Supreme Court (along with three federal circuit courts) as to whether a common law claim that a manufacturer is liable for failing to equip its boats with propeller guards is preempted by the Boat Safety Act.

In *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), the Texas Supreme Court held that the Boat Safety Act neither expressly nor impliedly preempts no-propeller-guard claims. The court emphasized the strong presumption against federal preemption of state common law claims – a presumption that "particularly obtains when, as in this case, state regulation of health and safety matters is involved." *Id.* at 249 (citing *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985)). In light of this strong presumption against preemption, *Moore* rejected the boat manufacturer's claim that the reference to "law or regulation" in the Boat Safety Act's preemption provision encompasses – and expressly preempts – common law claims. 889 S.W.2d at 250.

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[2] In fact, in opposing review in *Lady*, the bankrupt defendant urged this Court to await review of the decision in *this* case, arguing that Mr. Sprietsma's claims against a non-bankrupt boat manufacturer would present a more suitable vehicle for review. *See* Respondent's Brief in Opposition at 24, *Lady v. Outboard Marine Corp.*, No. 00-1031.

The Texas Supreme Court also rejected the boat manufacturers' argument that the plaintiff's no-propeller-guard claims were impliedly preempted under the Act. *Id.* at 251. On this point, the defendants argued that "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's determination that guards should not be mandated." *Id.* The Texas Supreme Court disagreed, stating, first, that the Coast Guard's decision not to commence rulemaking did not "reflect an intention to foreclose state tort liability." *Id.*

As to the boat manufacturers' claim that preemption must be implied because permitting no-propeller-guard claims would undermine Congress' goal of creating uniform safety regulations, the Texas Supreme Court stated: "the [Act's] savings clause reflects that Congress was willing to tolerate some tension between the concept that uniform safety regulations should be established at the federal level and the concept that a state may nevertheless award tort damages for unsafe products." *Id.* at 252. This approach makes sense, in the Texas Supreme Court's view, because "the regulatory effect of damage awards is not equivalent to that of positive enactments: a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer – installing guards on future boats or taking no action and bearing the liability as a cost of doing business." *Id.* at 251 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988)). *Moore* concluded that, although "[w]e recognize the potential for conflict, [we] do not think it justifies a holding of preemption." *Id.* at 251-52.

The decision below is squarely in conflict with *Moore*. Although the two courts agree that there is no express

preemption of common law claims under the Boat Safety Act (in light of the Act's savings clause), the Illinois Supreme Court split with *Moore* in holding that no-propeller-guard claims are impliedly preempted by the Coast Guard's regulatory inaction. To reach this conclusion, the lower court began by abandoning a core proposition of law embraced in *Moore*: that such claims are subject to a strong presumption against federal preemption. *See* App. 6. Having jettisoned the presumption against preemption, the lower court went on to conclude – again directly contrary to the holding in *Moore* – that "[a] damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the [Boat Safety Act]." App. 16. Such an outcome, the court held, "would present an obstacle to the accomplishment and execution of the purposes and objectives Congress sought in enacting the [Boat Safety Act]." App. 16.

Thus, the decision below is manifestly at odds with the Texas Supreme Court's decision in *Moore*. In addition, as the lower court recognized, this split is reflected in numerous other court decisions regarding the scope of preemption under the Boat Safety Act, including *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir.), *cert. denied*, 516 U.S. 866 (1995), *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. dismissed*, 523 U.S. 1113 (1998), and *Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied sub nom. Lady v. Outboard Marine Corp.*, 121 S. Ct. 1402 (2001). *See* App.16 (collecting cases). Review is warranted here to finish the job started in *Lewis*: to resolve this split, prevent further confusion among the lower courts, and ensure that state

common law claims that Congress intended to preserve are not preempted.[3]

III. The Decision Below Conflicts with Relevant Decisions of this Court.

Review is also warranted because the lower court's ruling conflicts with decisions of this Court in at least three ways: first, it improperly affords preemptive effect to federal regulatory inaction; second, it improperly abandons the long-standing presumption against preemption; and, third, it fails to give any – let alone sufficient – weight to the federal government's own interpretation of the preemptive effect of the Coast Guard's decision not to regulate propeller guards.

A. The Lower Court Erroneously Afforded Preemptive Effect to the Federal Government's Regulatory Inaction.

To begin with, the Illinois Supreme Court's holding that the Coast Guard's decision *not* to commence rulemaking with respect to propeller guards has preemptive force directly conflicts with *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), which made clear that the mere absence of federal regulation with respect to a particular product has no preemptive effect. In *Myrick*, this Court considered whether a claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks was preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982), and by a federal motor vehicle

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[3] Unless this split is resolved, the viability of no-propeller-guard claims in Texas will depend entirely on whether a case proceeds in state or federal court.

safety regulation governing airbrake systems in buses, trucks, and trailers. 49 C.F.R. § 571.121 (S3) (1993) ("Standard 121").

As originally promulgated in 1974, Standard 121 required that all truck manufacturers install antilock brakes. This requirement was invalidated by the Ninth Circuit's decision in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 640 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), which held that, although the braking performance of some trucks was improved by antilock brakes, "critical problems began with mass production of vehicles designed to meet the Standard." *Id.* at 641. Due to the unforeseen manufacturing difficulties encountered during mass production of antilock systems, the Ninth Circuit ordered the federal regulatory agency to suspend the antilock requirements of Standard 121. *Id.* at 643. In response, the agency added language to the regulation stating that the antilock brake provisions invalidated by the *Paccar* ruling "are not applicable to trucks and trailers." 49 C.F.R. § 571.121(S3).

In *Myrick*, the truck manufacturers argued that Standard 121 preempted common law claims that their trucks were defective because they lacked antilock brakes. This Court disagreed, holding that there could be no express preemption because there was no federal standard in place regarding antilock brakes in trucks. *See* 514 U.S. at 286. In so holding, *Myrick* explicitly rejected the truck manufacturers' claim "that the absence of regulation itself constitutes regulation," especially where "there is no evidence that [the federal agency] decided that [the product] should be free from all state regulation . . .." *Id.* Regarding implied preemption, the Court ruled, first, that "it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard for a private party to comply with." *Id.* at 289. Frustration of federal objectives was also not an issue, in the Court's view, because

the federal regulation "currently has nothing to say concerning [antilock brake] devices one way or another, and [the federal agency] has not ordered truck manufacturers to refrain from using [such] devices. A finding of liability against petitioners would undermine no federal objectives or purposes with respect to [antilock brake] devices, since none exist." *Id.* at 289-90.

The decision below is squarely at odds with *Myrick*. In finding federal preemption of petitioner's no-propeller-guard claim, the Illinois Supreme Court embraced the very proposition that was rejected in *Myrick*: that an agency's decision not to regulate has the same preemptive force as a decision to regulate. This ruling has the perverse effect of transforming a federal decision *not* to commence rulemaking regarding propeller guards on motor boats into an affirmative decision to *ban* any common law claim seeking to require a manufacturer to pay damages for failing to include a specific propeller guard on a specific boat. Not only is this conclusion contrary to *Myrick*, but it flies in the face of numerous prior decisions of this Court holding that mere federal regulatory inaction, without more, does not imply an authoritative federal determination that the area is best left unregulated. *See, e.g., Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 496, 503-04 (1988) (federal inaction alone does not have preemptive effect); *Arkansas Elec. Co-Op v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (regulatory inaction only has preemptive force where Congress has made clear that its intention is "to fill a regulatory gap, not to perpetuate one.") (footnote omitted).

The lower court also ignored the fact that, as in *Myrick*, "there is no evidence that [the federal agency] decided that [the product at issue] should be free from all state regulation . . .." 514 U.S. at 286. As explained above, the Coast Guard's

decision not to commence rulemaking regarding propeller guards stemmed from its "many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation." App. 40. Due to the lack of a "universally acceptable" solution, and the high statutory threshold of having to demonstrate that federal regulation would "avoid a substantial risk of personal injury to the public," 46 U.S.C. § 4302(c)(2), the Coast Guard declined to commence rulemaking to consider a nationwide standard for propeller guards. *Id.* The agency never stated, however, that there was *no* technology appropriate for use in *any* mode of boat operation; rather, the Coast Guard found that there was no technology appropriate for a national, *across-the-board* regulation applicable to *all* types of boats. App. 40. Contrary to the Illinois Supreme Court's apparent reasoning, this determination would be entirely consistent with a state's decision to allow some boat manufacturers to be held liable for failing to install a certain type of propeller guard on specific boats or on boats used for a particular purpose.

There is also no evidence that the Coast Guard intended to restrict the ability of victims of propeller accidents to seek compensation through the common law tort system. To the contrary, as *Moore* recognized, the Propeller Subcommittee report that was the basis for the Coast Guard's decision not to regulate propeller guards "mentions that manufacturers have been sued for not installing propeller guards, and recognizes that a federal requirement of propeller guards would establish a prima facie case of manufacturer liability in some states." 889 S.W.2d at 252. Despite this recognition of on-going litigation regarding propeller guards, the agency never suggested that it intended to preempt such actions in the future. *See* App. 40-41. "Thus even if the Coast Guard made a policy determination, carrying preemptive weight, that propeller

guards should not be regulated, its preemptive effect would not necessarily include common law." 889 S.W.2d at 252.

The absence of any preemptive intent on the part of the Coast Guard is dramatically underscored by the manner in which its decision was rendered. Under the Boat Safety Act, the Coast Guard is directed to "*prescribe regulations* . . . establishing minimum safety standards . . .." 46 U.S.C. § 4302(a)(1) (emphasis added). In keeping with this directive, Congress clearly intended that only properly promulgated regulations would exert preemptive force under the Act. In this case, however, there was no rulemaking proceeding of any sort, let alone a federal regulation proclaiming the Coast Guard's intention to ban state regulation of propeller guards. Instead, the agency's decision not to commence rulemaking was the product of internal deliberations by an advisory subcommitee (as opposed to the notice-and-comment rulemaking procedures mandated by the Administrative Procedure Act, *see* 5 U.S.C. § 553 (1994)), and was embodied in an informal letter to the Chairperson of the Advisory Council setting forth the agency's decision not to regulate propeller guards. App. 40-44. This is hardly the type of "clear and manifest" expression of preemptive purpose that must be evident before preemption may be found based on regulatory inaction. *Isla Petroleum*, 485 U.S. at 503.

At bottom, the Coast Guard's decision not to commence rulemaking with regard to propeller guards is markedly similar to the fate of antilock brake regulation described in *Myrick*. In both cases, the absence of regulation was due to a determination that the current state of technology did not warrant a universal regulatory solution to a safety problem. In *Myrick*, that decision was made by the Ninth Circuit and then memorialized in the amendment to Standard 121 eliminating the antilock brake

requirement for trucks and trailers; in this case, the decision not to commence rulemaking was made by the agency in the first instance. But the result in both instances was the same: an absence of any federal regulation mandating *or* prohibiting the use of the technology in question. *Myrick* makes clear that federal preemption does not exist under these circumstances.

The Illinois Supreme Court's decision, moreover, has implications far beyond the narrow issue of preemption under the Boat Safety Act. If the decision below is permitted to stand, it could massively broaden the scope of federal preemption far beyond what Congress ever intended. Under the lower court's reasoning, *any* federal decision not to regulate could be deemed to have preemptive force, regardless of the reason for federal inaction and regardless of the extent to which Congress made clear its intent *not* to intrude on States' regulatory power and/or strip individuals of their common law remedies. Not only would this constitute a grievous blow against the traditional rights of victims to seek redress for injuries caused by dangerous products, but it would strip the States of their historic power to protect the health and welfare of their citizens. Review is warranted to prevent this deep encroachment on the rights of the States to protect their citizens and of citizens to use the common law to protect themselves – rights that neither Congress nor the Coast Guard ever expressed any intention to restrict.

B. The Lower Court Erroneously Disregarded the Presumption Against Preemption.

Review is also warranted to correct the lower court's decision to abandon any presumption against preemption of common law claims in all cases in the "maritime" context – even those involving a small recreational boat in state waters.

See App. 6. This approach does violence to the rights of the States to provide compensation for their citizens and flies in the face of long-standing decisions of this Court recognizing a strong presumption against federal preemption in health and safety matters. *See generally Medtronic*, 518 U.S. at 485.

The lower court's error stemmed in part from a misreading of this Court's recent decision in *Locke*, 529 U.S. 89 (2000), which involved state regulations of the operation and design of ocean-going oil tankers used in international commerce. *Locke* merely held that, in a case where "[t]he state laws in question bear upon national and international *maritime commerce*, . . . there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Id.* at 108 (emphasis added). A presumption against preemption is inappropriate in such cases, this Court reasoned, given Congress' longstanding authority "to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations." *Id.* at 98. The Court also expressed concern that regulations governing international ocean-going oil tankers implicated "the substantial foreign affairs interests of the Federal Government." *Id.* at 97.

These concerns have no bearing here. First, this case is entirely unrelated to "interstate navigation," as the accident that harmed petitioner occurred on Tennessee waters. Second, this case has nothing to do with "maritime commerce," international or otherwise, as the Boat Safety Act merely involves federal regulation of *recreational* vessels, such as the boat that struck petitioner's wife. *See* 46 U.S.C. § 4301. Finally, the United States' "foreign affairs interests" – so paramount in *Locke* that "the governments of 13 ocean-going nations expressed their concerns [about conflicting state regulations] through a

diplomatic note" (429 U.S. at 97) – are clearly not implicated here. The United States has no greater interest in maintaining presumptively exclusive authority over safety features on small recreational boats than it has regulating medical devices, cigarettes, and myriad other products over which the federal government has authority and yet the presumption against preemption has been applied by this Court with full force. *See, e.g., Medtronic*, 518 U.S. at 485 (medical devices); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (cigarettes).

At the same time, *Locke* reaffirmed that the "beginning assumption" against preemption continues to apply in cases involving the "historic police powers of the States." 429 U.S. at 107 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Numerous prior decisions of this Court have made clear that such powers may be exercised concurrently with the federal government's jurisdiction over maritime matters, *see, e.g., Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Kelly v. State of Washington*, 302 U.S. 1 (1937), and that, absent express Congressional intent to preempt the entire field of state law, preemption only lies where the conflict between state and federal law is "so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly*, 302 U.S. at 10 (citations omitted). *See also Askew*, 411 U.S. at 341; *Huron*, 362 U.S. at 444. Nothing in *Locke* suggests that these cases are no longer good law, or that the presumption against preemption no longer applies in cases – such as this one – that involve the historic police powers of the states to compensate accident victims through the tort system. *See, e.g., Medtronic*, 518 U.S. at 488. Review is warranted to correct the Illinois Supreme Court's unwarranted holding to the contrary.

C. The Lower Court Erroneously Disregarded the United States' Own Interpretation of the Preemptive Effect of the Coast Guard's Regulatory Inaction.

Finally, review is warranted because the lower court improperly disregarded this Court's repeated teachings that the views of the federal government are entitled to deference when determining the preemptive effect of an agency's regulatory decisions. As this Court held in *Medtronic*, the United States' interpretation of the scope of preemption is entitled to "substantial weight." 518 U.S. at 496 (majority opinion); *id.* at 505-07 (Breyer, J., concurring). *See also Geier v. Honda*, 529 U.S. 861, 885 (1999) (federal government's interpretation of preemptive scope of agency regulations is entitled to "special weight"); *Hillsborough County*, 471 U.S. at 714-15 ("[t]he [federal government's] statement is dispositive on the question of implicit intent to pre-empt unless either the agency's position is inconsistent with clearly expressed congressional intent, . . . or subsequent developments reveal a change in that position") (citations omitted). Deference to the federal government's understanding of the Boat Safety Act is particularly appropriate where, as here, the United States is *ceding* authority to the states, not trying to claim power for itself. The concern behind the preemption doctrine – protection of federal interests from inconsistent state or local activity – is not implicated where the United States itself does not object to – and indeed welcomes – state participation. *See Hillsborough County*, 471 U.S. at 714-15.

The lower court paid lip service to these principles, but then substituted its judgment for that of the United States in holding that petitioner's common law claims are impliedly preempted by federal law. Such an approach was warranted, in the lower court's view, because the United States had not entered an

appearance before it – even though the federal government's brief in *Lewis* was made part of the record in this proceeding. This reasoning simply makes no sense: an *amicus curiae* brief filed by the Solicitor General's office represents the United States' official position on an issue whether or not the United States has entered a formal appearance in a case.

The lower court also held that the *Lewis* brief is not entitled to deference because "arguments made in the *Lewis* brief have been rejected by the Supreme Court in *Geier*." App. 18. This argument is simply wrong. With reference to implied conflict preemption (which is the issue before this Court), the United States in *Lewis* argued that the absence of any federal regulation of propeller guards, coupled with the absence of any federal determination that a requirement of propeller guards would be contrary to boat safety, meant that a common law damage claim such as petitioner's "would not in any way conflict with the federal regulatory scheme." Brief for United States as *Amicus Curiae* Supporting Petitioners at 26, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288).

This argument is entirely consistent with, and not in any way undercut by, this Court's recent decision in *Geier*. Regarding implied conflict preemption, *Geier* held that a common law claim that an automobile was defective because it lacked an airbag conflicted with a complex federal regulation that was carefully designed to "bring about a mix of different [passive restraint] devices introduced gradually over time." *See* 529 U.S. at 874. On this latter point, this Court's holding was narrowly confined to the particular regulation at issue, and has no bearing on whether a no-propeller-guard claim like petitioner's would conflict with the U.S. Coast Guard's regulatory *in*action regarding propeller guards.

At the same time, in one key respect that went unmentioned by the lower court, *Geier* confirms that the Texas Supreme Court got it exactly right. In *Geier*, the United States had filed an *amicus curiae* brief arguing that no-airbag claims would conflict with federal regulatory purposes. This Court ultimately deferred to that position, holding that the United States' interpretation of the preemptive effect of agency action is entitled to "special weight." *Geier*, 529 U.S. at 875. Thus, if anything, *Geier* provides further reason to grant review and accord the United States' authoritative position on the preemptive effect of the Coast Guard's regulatory inaction the deference it deserves.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

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Docket No. 89492 – Agenda 17 – March 2001
REX R. SPRIETSMA, Adm'r of the Estate of Jeanne Sprietsma, Deceased, Appellant, v. MERCURY MARINE, a Division of Brunswick Corporation, Appellee.

JUSTICE GARMAN delivered the opinion of the court:

This issue in this case is whether the Federal Boat Safety Act of 1971 (FBSA) (46 U.S.C. §4301 *et seq*. (1994)) preempts state common law causes of action based on the manufacturer's failure to install propeller guards on boat engines. In July 1995, while boating in Tennessee, plaintiff's decedent, Jeanne Sprietsma, fell from a motor boat and was struck by the motor's propeller blades. As a result, she suffered serious injuries that resulted in her death. The boat was equipped with a 115-horsepower outboard motor, which did not contain a propeller guard. The motor was designed, manufactured, and sold by Mercury Marine.

The decedent's husband, Rex Sprietsma, filed a wrongful-death action against, among others, Mercury Marine, seeking to recover damages for decedent's pain and suffering along with the pecuniary loss suffered by himself and his son. Mercury Marine filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 1998)) on the grounds that Sprietsma's claims were expressly preempted by the language of the FBSA's preemption clause and were also impliedly preempted. The circuit court of Cook County granted Mercury Marine's motion to dismiss, finding the claims to be impliedly preempted. The appellate court affirmed, holding that the common law claims for failure to install propeller guards were expressly preempted. 312 Ill. App. 3d 1040. We granted Sprietsma's petition for leave to appeal pursuant to Supreme Court Rule 315 (177 Ill. 2d R. 315). As

this case is an appeal from a section 2-619 motion to dismiss, our review is *de novo*. *Carver v. Nall*, 186 Ill. 2d 554, 557 (1999).

A. The Federal Boat Safety Act of 1971 and the Coast Guard's Decision Regarding Propeller Guards

Congress enacted the FBSA "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating-presently the Secretary of Transportation." S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333. Due to an increase in the number of boat-related accidents and fatalities, Congress enacted the FBSA to establish "a coordinated national boating safety program." S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1331, 1334-35. To implement this goal, the FBSA authorized the Secretary of Transportation (Secretary) to prescribe regulations necessary to establish minimum safety standards for recreational boats. 46 U.S.C. §4302(a) (1994). The Secretary may delegate regulatory functions to an organization or agency under his supervision (46 U.S.C. §4303(a) (1994)) and, in fact, has delegated the regulatory authority to the Commandant of the United States Coast Guard (49 C.F.R. §1.46(n)(1) (1999)). Before issuing a regulation, the Coast Guard must consult with the National Boating Safety Advisory Council (Advisory Council) to consider the need for a regulation and the extent to which the regulations will contribute to recreational boating safety. 46 U.S.C. §4302(c)(1) through (c)(4) (1994).

In 1998, the Coast Guard considered whether to require manufacturers to install propeller guards on their boat motors.

The Coast Guard directed the Advisory Council to review the available data on prevention of propeller-strike accidents and to assess the feasibility and potential safety advantages and disadvantages of propeller guards. The Advisory Council appointed a Propeller Guard Subcommittee (Subcommittee) to review and analyze the data and to consider whether the Coast Guard should move toward a federal propeller guard requirement. National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee, November 7, 1989, at Appendix A.

After studying the issue and conducting public hearings, the Subcommittee unanimously recommended that the "Coast Guard should take no regulatory action to require propeller guards." Report of the Propeller Guard Subcommittee, at 24. The Subcommittee made this recommendation after finding that propeller guards could create other safety concerns, including: (1) adversely affecting boat operations at speeds greater than 10 miles per hour; (2) increasing the chance of blunt force contact to a person in the water; and (3) creating a new hazard in that an arm or leg could be caught between the guard and the propeller blades. Report of the Propeller Guard Subcommittee, at 19-21.

The Subcommittee's report was presented to the Advisory Council, which accepted and adopted the recommendations. Minutes of the 44th Meeting of the National Boating Safety Advisory Council 19 (November 6-7, 1989). The report and recommendations were then sent to the Coast Guard, which adopted the Advisory Council's recommendations, including its recommendation that no regulatory action should be taken to require propeller guards because "[a]vailable propeller guard accident data [does] not support imposition of a regulation requiring propeller guards on motorboats." Letter from Robert T. Nelson, Rear Admiral, U.S.

Coast Guard, Chief, Office of Navigation Safety and Waterway Services, to A. Newell Garden, Chairman, National Boating Safety Advisory Council (February 1, 1990).

B. Federal Preemption

Pursuant to the supremacy clause of article VI of the United States Constitution, the laws of the United States "shall be the supreme Law of the Land *** any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Thus, state law is without effect if it conflicts with federal law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 422, 112 S. Ct. 2608, 2617 (1992). Consideration of issues arising under the supremacy clause begins with the assumption that the historic state police powers are not to be superseded by federal law unless that is the clear and manifest purpose of Congress. *Cipollone*, 505 U.S. at 516, 120 L. Ed. 2d at 422, 112 S. Ct. at 2617. Thus, the ultimate question in any preemption analysis is to determine the intent of Congress. *Cipollone*, 505 U.S. at 516, 120 L. Ed. 2d at 422, 112 S. Ct. at 2617.

Federal law can preempt state law under the supremacy clause in three circumstances: (1) where Congress has expressly preempted state action (express preemption); (2) where Congress has implemented a comprehensive regulatory scheme in an area, thus removing the entire field from state realm (implied field preemption); or (3) where state action actually conflicts with federal law (implied conflict preemption). *Cipollone*, 505 U.S. at 516, 120 L. Ed. 2d at 422-23, 112 S. Ct. at 2617; *English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 74, 110 S. Ct. 2270, 2275 (1990). Our focus in this case will deal with express and implied conflict preemption.

The parties dispute whether our analysis should begin with a presumption that federal law does not preempt Sprietsma's common law tort claims against Mercury Marine. Sprietsma contends that there is a strong presumption against preemption here because federal preemption would displace state police powers that protect the health and safety of its citizens. Conversely, Mercury Marine argues that this case does not involve the historic police powers of the state but derives from federal maritime jurisdiction.

The United States Supreme Court has stated that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108, 146 L. Ed. 2d 69, 88, 120 S. Ct. 1135, 1147 (2000). However, an assumption of nonpreemption is triggered when the state regulates health and safety matters which have traditionally come within the jurisdiction of the state through its police powers. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474, 135 L. Ed. 2d 700, 709, 116 S. Ct. 2240, 2245 (1996). We recognize that Sprietsma's claim that Mercury Marine designed a defective motor by failing to install a propeller guard relates to health and safety concerns. However, the claim also encompasses maritime activity, which is traditionally within the realm of federal regulation. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215, 61 L. Ed. 1086, 1098, 37 S. Ct. 524, 628 (1917) ("Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country"); *Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598, 607 (5th Cir. 2000).

Section 4301(a) states that the FBSA and its regulations apply "to a recreational vessel and associated equipment carried in the vessel on waters subject to the jurisdiction of the United

States and, for a vessel owned in the United States, on the high seas." 46 U.S.C. §4301(A) (1994). Furthermore, the FBSA's "[g]eneral jurisdictional applicability is to vessels within the historic federal maritime jurisdiction." S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1338. In deciding whether the claims in this case relate to federal maritime activity, we note that the United States Supreme Court has held that a collision between two pleasure boats on navigable waters had a sufficient nexus to traditional maritime activity to come within the admiralty jurisdiction of the federal courts. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674, 73 L. Ed. 2d 300, 306, 102 S. Ct. 2654, 2658 (1982). Thus, Sprietsma's claims bear upon an area historically regulated by the federal government. When "state laws *** bear upon national and international maritime commerce, *** there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108, 146 L. Ed. 2d at 88-89, 120 S. Ct. at 1148. Although Sprietsma's claims bear upon state and federal concerns, we believe the federal concerns predominate in this case. Therefore, in deciding whether Sprietsma's claims are preempted by the FBSA, we will not apply a presumption against preemption.

In addition, as we address the preemption issue, we will look to the decisions of the federal district and circuit courts. Although we have stated in the past that the decisions of federal courts interpreting a federal statute are controlling on Illinois courts (see *Busch v. Graphics Color Corp.*, 169 Ill. 2d 325, 335 (1996)), this overstates the degree of deference this court must pay to federal decisions. Thus, in *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 381 (1999), we elected to follow the precedent of the Seventh Circuit with regard to its interpretation of the Federal Employer's Liability Act (FELA) (45 U.S.C. §15

et seq. (1994)), because we found the Seventh Circuit analysis to be "reasonable and logical." More recently, however, we declined to follow Seventh Circuit precedent in a case involving a preemption issue under FELA when there was a split of authority among the federal circuits and we believed the Seventh Circuit case was wrongly decided. See *Weiland v. Tectronics Pacing Systems, Inc.*, 188 Ill. 2d 415, 423 (1999).

Nevertheless, as we have repeatedly recognized, uniformity of decision is an important consideration when state courts interpret federal statutes. See *Weiland*, 188 Ill. 2d at 422; *Wilson*, 187 Ill. 2d at 383; *Busch*, 169 Ill. 2d at 335. Uniformity is particularly important where, as here, the federal statute relates to a product that is inherently mobile and thus likely to move from state to state. Indeed, this suit was brought to recover damages in an Illinois court, under Illinois law, for a death that took place in Tennessee. Boats also frequently navigate in lakes or rivers that mark the boundary between two states. Thus, it is essential that a uniform body of law be developed. In the absence of a decision of the United States Supreme Court, which would definitively answer the question presented by this case, we elect to give considerable weight to the decisions of federal courts of appeals and federal district courts that have addressed this issue.

C. Express Preemption

Keeping in mind the preceding preemption principles, we first address whether the FBSA expressly preempts Sprietsma's common law tort claims against Mercury Marine. Because Congress has demonstrated its intent to preempt some aspects of the state law under section 4306 (46 U.S.C. §4306 (1994)), we must determine the scope of preemption under that provision by focusing on its text. See *CSX Transportation, Inc.*

v. Easterwood, 507 U.S. 658, 664, 1223 L. Ed. 2d 387, 396, 113 S. Ct. 1732, 1737 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent").

Section 4306 states:

> "Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. §4306 (1994).

Section 4306 preempts state laws or regulations that are not identical to the regulations promulgated under the FBSA. Although the FBSA does not define "law or regulation," the phrase clearly indicates an intent to include common law claims. *Cipollone*, 505 U.S. at 522, 120 L. Ed. 2d at 426, 112 S. Ct. at 2620 (state law includes common law as well as statutes and regulations); *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1501 (11th Cir. 1997) (language demonstrates intent to include common law claims); *Farner*, 239 Ill. App. 3d at 891. We also note that both state and federal courts have held that the preemption provision of the FBSA expressly preempts

common law tort claims. See, *e.g., Carstensen v. Brunswick Corp.*, 49 F.3d 430, 433 (8th Cir. 1995); *Moss v. Outboard Marine Corp.*, 915 F.Supp. 183, 186 (E.D. Cal. 1996); *Shield v. Bayliner Marine Corp.*, 822 F.Supp. 81, 84 (D. Conn. 1993); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D. Ohio 1991); *Farner v. Brunswick Corp.*, 239 Ill. App. 3d 885, 891-92 (1992); *Ryan v. Brunswick Corp.*, 454 Mich. 20, 39, 557 N.W.2d 541, 551 (1997).

However, we must examine section 4306 in conjunction with the FBSA's savings clause provision of section 4311(g) (46 U.S.C. §4311(g) (1994)), which states: "[c]ompliance with this chapter or standards, regulations, or other prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. §4311(g) (1994). Although section 4306, the preemption provision, evinces Congress' intent to expressly preempt state laws or regulations not identical to those promulgated in the FBSA, this provision prevents us from finding express preemption.

The United States Supreme Court in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868, 146 L. Ed. 914, 923, 120 S. Ct. 1913, 1918 (2000), stated that the inclusion of a savings clause prohibits a broad reading of the express preemption provision. The Court noted that the presence of a savings clause "assumes that there are some significant number of common-law liability cases to save." *Geier*, 529 U.S. at 868, 146 L. Ed. 2d at 923, 120 S. Ct. at 1918. We agree that section 4311 limits section 4306. Consequently, we find no express preemption. See *Lady*, 228 F.3d at 611 (unable to conclude that section 4306 expressly preempted common law tort action); *Lewis*, 107 F.3d at 1502 (express terms of FBSA fail to show Congress' intent to preempt common law claims).

D. Implied Conflict Preemption

Although we find Sprietsma's action not to be expressly preempted by the FBSA, we are not prohibited from finding implied preemption. *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, __, 148 L. Ed. 2d 854, 863-64, 121 S. Ct. 1012, 1019 (2001) ("[N]either an express pre-emption provision nor a savings clause 'bar[s] the ordinary working of conflict pre-emption principles'"), quoting *Geier*, 529 U.S. at 869, 146 L. Ed. 2d at 924, 120 S. Ct. at 1919; *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288, 131 L. Ed. 2d 385, 393, 115 S. Ct. 1483, 1488 (1995) (the inclusion of an express preemption provision "does not mean that the express clause entirely forecloses any possibility of implied pre-emption").

The United States Supreme Court has found implied conflict preemption where it is "impossible for a private party to comply with both state and federal requirements" (*English*, 496 U.S. at 79, 110 L. Ed. 2d at 74, 110 S. Ct. at 2275), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines v. Davidowitz*, 312 U.S. 52, 67-68, 85 L. Ed. 581, 587, 61 S. Ct. 399, 404 (1941); see also *Freightliner*, 514 U.S. at 287, 131 L. Ed. 2d at 392, 115 S. Ct. at 1487). Since it is not impossible for a manufacturer to comply with a state common law rule requiring propeller guards and the Coast Guard's decision not to require them, we will address whether a state common law tort claim based on failure to install the guards stands as an obstacle to the accomplishment of the purposes and objectives Congress sought to achieve enacting the FBSA.

Initially, Sprietsma maintains that the Supreme Court's decision in *Freightliner* precludes a finding of implied preemption in this case. In *Freightliner*, the Supreme Court

considered whether common law claims based on the failure to install antilock brakes on 18-wheel tractor-trailers were expressly or impliedly preempted by the preemption clause of the Vehicle Safety Act. *Freightliner*, 514 U.S. at 282, 131 L. Ed. 2d at 389, 115 S. Ct. at 1485. The defendant tractor-trailer manufacturers argued that the failure-to-install claims were preempted because the National Highway Traffic Safety Administration (NHTSA) had indicated its intent to regulate braking systems by issuing a regulation on the matter. *Freightliner*, 514 U.S. at 284-86, 131 L. Ed. 2d at 390-91, 115 S. Ct. at 1486-87. That regulation was struck down by the Court of Appeals for the Ninth Circuit, but the defendant manufacturers argued it still had preemptive effect because it showed the NHTSA's intent to forbid state regulation of breaking systems. *Freightliner*, 514 U.S. at 286, 131 L. Ed. 2d at 391-92, 115 S. Ct. at 1487.

The Supreme Court rejected the manufacturers' argument, stating that there was no federal standard on stopping distances or vehicle stability for trucks or trailers, and there was "no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances an vehicle stability." *Freightliner*, 514 U.S. at 286, 131 L. Ed. 2d at 392, 115 S. Ct. at 1487. The Court stated that "the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes." *Freightliner*, 514 U.S. at 286, 131 L. Ed. 2d at 392, 115 S. Ct. at 1487. Thus, states could implement safety standards and, without any federal standards, a liability claim would not be in conflict with or frustrate the objectives of Congress. *Freightliner*, 514 U.S. at 289, 131 L. Ed. 2d at 394, 115 S. Ct. at 1488.

In contrast to *Freightliner*, where the lack of federal

regulation was not the result of an affirmative decision not to regulate, here, the Coast Guard did make an affirmative decision to refrain from promulgating a propeller guard requirement. See *Lady*, 228 F.3d at 612 ("the lack of a regulation mandating propeller guards on recreational boats came after the Coast Guard studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate"); *Lewis*, 107 F.3d at 1504 ("[w]hile an absence of regulation under the Vehicle Safety Act does not prevent states from regulating motor vehicle safety standards, an absence of federal regulation under the FBSA means that no regulation, state or federal, is appropriate[;] *Freightliner* is distinguishable for that reason"). As we agree with the federal decisions in *Lady* and *Lewis*, the ruling in *Freightliner* does not preclude a finding of implied preemption in this case.

In *Geier*, the Supreme Court determined whether Federal Motor Vehicle Safety Standard 208 (Safety Standard 208) preempted a common law tort action based on the failure to install a driver's side airbag. The Department of Transportation stated that the purpose of Safety Standard 208 was to provide auto manufacturers with a choice of whether or not to install airbags with a gradual phase-in of passive restraint devices. *Geier*, 529 U.S. at 878-79, 146 L. Ed. 2d at 930, 120 S. Ct. at 1924. Under an implied conflict preemption analysis, the Court stated that Geier's tort action depended upon her claim that auto manufacturers had a duty to install an airbag in her car when it was made. *Geier*, 529 U.S. at 881, 146 L. Ed. 2d at 931-32, 120 S. Ct. at 1925. This alleged duty would have required other auto manufacturers to install airbags in similar cars rather than other safety restraint systems, such as automatic seatbelts or passive interiors. *Geier*, 529 U.S. at 881, 146 L. Ed. 2d at 932, 120 S. Ct. at 1925. This claim "would have presented an obstacle to the variety and mix of devices that the

federal regulation sought *** [and] also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Geier*, 529 U.S. at 881, 146 L. Ed. 2d at 932, 120 S. Ct. at 1925. The Court thus concluded that Safety Standard 208 preempted Geier's tort claim because of the obstacle it presented to the accomplishment of federal objectives. *Geier*, 529 U.S. at 881, 146 L. Ed. 2d at 932, 120 S. Ct. at 1925

Mercury Marine maintains that we should apply *Geier*'s ruling that Safety Standard 208 preempted conflicting state laws to this case in order to preempt Sprietsma's tort claim. Sprietsma, on the other hand, argues that there is no regulation by the Coast Guard with which his claim could conflict, only a decision not to prescribe a standard. According to Sprietsma, the absence of a regulation does not in itself constitute a regulation. See *Freightliner*, 514 U.S. 286, 131 L. Ed. 2d at 392, 115 S. Ct. at 1487. However, the Supreme Court has stated that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." (Emphases omitted.) *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 384, 76 L. Ed. 2d 1, 10, 103 S. Ct. 1905, 1912 (1983); see also *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 414, 151-52, 103 L. Ed. 2d 118, 135, 109 S. Ct. 971, 978 (1989). The Supreme Court has also concluded that "'where [the] failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 55 L. Ed. 2d 179, 201, 98 S. Ct. 988, 1004-05 (1978), quoting *Bethlehem*

Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 774, 91 L. Ed. 1234, 1246, 67 S. Ct. 1026, 1030 (1947).

In determining whether the Coast Guard's failure to promulgate a propeller guard requirement compels the conclusion that no such regulation is appropriate, we find helpful the Supreme Court's decision in *Ray*. In that case, the Supreme Court considered whether federal law preempted the State of Washington's enactment of a law regulating standard safety features and weight of oil tankers navigating Puget Sound. The Washington "Tanker Law" sought to exclude tankers in excess of 125,000 DWT (dead weight tons) from Puget Sound. *Ray*, 435 U.S. at 173, 55 L. Ed. 2d at 198, 98 S. Ct. at 1002. Shipbuilders alleged these requirements were preempted by section 1222(b) of the federal Ports and Waterways Safety Act (PWSA) which prohibited states from imposing higher safety standards than those prescribed by the Transportation Secretary. The Court stated that enforcement of the state's design requirements "would at least frustrate *** the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers." *Ray*, 435 U.S. at 165, 55 L. Ed. 2d at 193, 98 S. Ct. at 998.

The Court then looked at the PWSA and the state's exclusion of vessels in excess of 125,000 DWT. *Ray*, 435 U.S. at 173, 55 L. Ed. 2d at 198, 98 S. Ct. at 1002. The Court found that section 1222(b) of the PWSA was intended to have a preemptive impact. Further, even without section 1222(b), it would be reluctant to uphold the Tanker Law's absolute ban on tankers in excess of 125,000 DWT. *Ray*, 435 U.S. at 178, 55 L. Ed. 2d at 201, 98 S. Ct. at 1004. The Court based this conclusion on the Coast Guard's vessel traffic control system of Rosario Strait. *Ray*, 435 U.S. at 178, 55 L. Ed. 2d at 201, 98 S. Ct. at 1004-05. The Transportation Secretary, through the

Coast Guard, promulgated the "Puget Sound Vessel Traffic System containing general rules, communication rules, vessel movement reporting requirements, a traffic separation scheme, special rules for ship movement in the Rosario Strait, descriptions and geographic coordinates of the separation zones and traffic lanes, and a specification of precautionary areas and reporting points." *Ray*, 435 U.S. at 170, 55 L. Ed. 2d at 196, 98 S. Ct. at 1001. A local Coast Guard rule prohibited the passage of more than one 70,000 DWT vessel in Rosario Strait in either direction at a given time, and in bad weather, the restriction was reduced to 40,000 DWT. *Ray*, 435 U.S. at 171, 55 L. Ed. 2d at 197, 98 S. Ct. at 1001.

The Court stated the question then was whether the Transportation Secretary, through the Coast Guard, had addressed the size limitation question. *Ray*, 435 U.S. at 174, 55 L. Ed. 2d at 199, 98 S. Ct. at 1003. Because of the navigation rules pertaining to the Rosario Strait, the Court held that the Secretary's failure to promulgate a ban on the operations of oil tankers in excess of 125,000 DWT took on the character of a ruling that no such regulation is appropriate pursuant to the policy of the PWSA. *Ray*, 435 U.S. at 178, 55 L. Ed. 2d at 201, 98 S. Ct. at 1004-05.

The Supreme Court reaffirmed the framework and holding of *Ray* in *Locke*, 529 U.S. at 103-04, 146 L. Ed. 2d at 85-86, 120 S. Ct. at 1145. There, the Court stated that "*Ray* defined the relevant inquiry for *** pre-emption as whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all." *Locke*, 529 U.S. at 110, 146 L. Ed. 2d at 89, 120 S. Ct. at 1148.

We believe that the Coast Guard's failure to promulgate

a propeller guard requirement here equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA. The Coast Guard made an informed decision that no regulatory action should be taken to require propeller guards after studying the findings and recommendations of the Advisory Council and the Propeller Guard Subcommittee. A damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the FBSA. See *Lady*, 228 F.3d at 614 (damage award "would effectively require boat manufacturers to install propeller guards, in direct contravention to the Coast Guard's policy against mandating such a device in favor of affording manufactures flexibility in the matter"); *Lewis*, 107 F.3d at 1505 (plaintiffs' "product liability claims seek to impose a propeller guard requirement"). Thus, Sprietsma's claim would present an obstacle to the accomplishment and execution of the purposes and objectives Congress sought in enacting the FBSA.

We stated earlier that in an effort to give uniform application to the FBSA, we would give great weight to federal decisions on this matter. In that regard, we note that several federal district courts and courts of appeals have found preemption, express or implied, in similar propeller guard cases. See, *e.g., Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000); *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997); *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995); *Moss v. Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996); *Davis v. Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shields v. Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Mowery v. Mercury Marine, Division of Brunswick Corp.*, 773 F. Supp. 1012 (N.D. Ohio 1991).

The Fifth Circuit Court of Appeals in *Lady* dealt with a jet ski operator who was severely injured by the propeller blades of a boat with which he had collided. *Lady*, 228 F.3d at 600. The court of appeals held that the operator's claims, based on the manufacturer's failure to install propeller guards on its boat, were impliedly preempted by the FBSA. *Lady*, 228 F.3d at 615. The Eleventh Circuit Court of Appeals in *Lewis* dealt with a passenger on a boat who was killed after she fell in the water and was struck by the propeller blades. *Lewis*, 107 F.3d at 1497. The court of appeals held that her parents' claims, based on the engine's being defective because it lacked a propeller guard, were impliedly preempted because they conflicted "with the regulatory uniformity purpose of the FBSA." *Lewis*, 107 F.3d at 1506.

On appeal to the United States Supreme Court, the Solicitor General in *Lewis* argued that the Coast Guard's failure to issue a regulation concerning propeller guards was not a basis for implied conflict preemption of common law tort claims.[1] Sprietsma argues that this court should adhere to the argument presented by the Solicitor General, arguing reversal in *Lewis*. In support of this contention, Sprietsma points out that in *Geier*, the Supreme Court placed "some weight upon DOT's [Department of Transportation's] interpretation of [Safety Standard] 208's objectives and its conclusion, as set forth in the Government's brief." *Geier*, 529 U.S. at 883, 146 L. Ed. 2d at 933, 120 S. Ct. at 1926. The Court concluded that

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[1] A petition for *certiorari* was granted in *Lewis v. Brunswick Corp.*, 522 U.S. 978, 139 L. Ed. 2d 337, 118 S. Ct. 439 (1997), but after oral argument and before a decision was issued, the parties settled and the petition for *certiorari* was dismissed (*Lewis v. Brunswick Corp.*, 523 U.S. 1113, 140 L. Ed. 2d 933, 118 S. Ct. 1793 (1998)).

it had "no reason to suspect that the Solicitor General's representation of DOT's views reflects anything other than 'the agency's fair and considered judgment on the matter.'" *Geier*, 529 U.S. at 884, 146 L. Ed. 2d at 933, 120 S. Ct. at 1927, quoting *Auer v. Robbins*, 519 U.S. 452, 462, 137 L. Ed. 2d 79, 91, 117 S. Ct. 905, 912 (1997). We do not believe that Sprietsma's reliance on the United States' position in *Lewis* warrants our deference on the matter.

First, the Solicitor General has not presented his argument concerning the *Lewis* case or the Sprietsma claim to this court. See *Lady*, 228 F.3d at 615 n.23 (absent his appearance, Solicitor General's views on the matter not before the court). Second, the Court in *Geier* stated that it would place "some weight" on the DOT's interpretation. *Geier*, 529 U.S. at 883, 146 L. Ed. 2d at 933, 120 S. Ct. 1926. Thus, even if we were to consider the Solicitor General's argument in *Lewis*, we do not believe the weight given to it would overcome the application of our implied preemption analysis. See *Lady*, 228 F.3d at 615 n.23. Third, arguments made in the *Lewis* brief have been rejected by the Supreme Court in *Geier*. For example, the Solicit General in the *Lewis* brief argued that the existence of the savings clause (section 4311(g)) "makes clear Congress's explicit intent to preserve tort liability." But the *Geier* Court found implied preemption in the presence of the savings clause and rejected the argument that this clause "bar[red] the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869, 146 L. Ed. 2d at 924, 120 S. Ct. at 1919.

In considering the federal decisions on this matter, we find the Fifth Circuit's opinion in *Lady* persuasive and agree that: "where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that

it was not appropriate to impose a requirement, that decision takes on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's." *Lady*, 228 F.3d at 615.

Furthermore, we are not persuaded by the two state court decisions that have held that federal law does not preempt state law in this type of case. See *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994); *Ard v. Jensen*, 996 S.W.2d 594 (Mo. App. 1999). As these cases represent the minority view on this matter, we believe a finding of preemption was warranted here in order to continue the line of uniformity laid down by the federal courts that have found preemption under the FBSA. Therefore, based on the preceding analysis, we find that Sprietsma's common law tort claims are impliedly preempted by the FBSA.

As a final note, Mercury Marine filed a motion to strike the first five pages of Sprietsma's reply brief insofar as it argued that the preemption defense was unavailable because the boat motor was manufactured in 1988, more than a year before the Coast Guard's 1990 decision not to take regulatory action. Sprietsma's argument was never addressed or ruled upon by the circuit or appellate courts. Also, Sprietsma did not raise the argument in his brief to this court but raised it for the first time in his reply brief. Under Supreme Court Rule 341(e)(7), points not argued in the appellant's brief are waived and shall not be raised in the reply brief. 177 Ill.2d R. 341(e)(7). Therefore, this argument is waived. Mercury Marine's motion to strike portions of Sprietsma's reply brief, which was taken with the case, is allowed.

For the foregoing reasons, we affirm the appellate court's judgment that the FBSA preempts Sprietsma's common

law claims for failure to install propeller guards.

Affirmed.

JUSTICE THOMAS took no part in the consideration or decision of this case.

CHIEF JUSTICE HARRISON, dissenting:

Under the supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2), state law must yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a lower federal court's interpretation. A state court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located. The only federal court whose interpretation of federal law is binding on the courts of Illinois is the United States Supreme Court. If the courts of this state follow a lower federal court's interpretation of federal law, they do so only because they choose to, not because they must. *Lockhart v. Fretwell*, 506 U.S. 364, 376, 122 L. Ed. 2d 180, 193, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring).

Notwithstanding the view expressed by former Justice Bilandic in his opinion in *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 335 (1996), the most recent decisions of our court have adhered to this view. In the absence of controlling United States Supreme Court precedent, we may "elect" to follow Seventh Circuit precedent construing a federal statute. *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 383-84 (1999). We are not required to do so, however, and are free to depart from that precedent whenever we believe it is wrongly decided. *Weiland v. Telectronics Pacing Systems, Inc.*, 188 Ill. 2d 415, 423 (1999). See also *People v. Kokoraleis*, 132 Ill. 2d 235,

293-94 (1989) ("decisions of lower Federal courts are not conclusive on State courts, except insofar as the decision of the lower Federal court may become the law of the case").

Contrary to my colleagues' view, this is not a case where our authority to make an independent interpretation of federal law should yield to considerations of uniformity. If our view of federal law differs from that of the lower federal courts and the conflict proves problematic, the United States Supreme Court may grant review to resolve the conflict. We should not perpetuate an erroneous interpretation of the law merely because it has been endorsed by some lower federal court judges. Uniformity is no virtue if it means being uniformly wrong.

I also disagree with the result the majority reaches on the merits. My colleagues go to enormous lengths to uphold a finding of preemption when they should be doing exactly the opposite. Preemption is disfavored. As our court has previously held, a presumption exists in every preemption case that Congress did *not* intend to supplant state law. *Scholtens v. Schneider*, 173 Ill. 2d 375, 379 (1996).

In ascertaining congressional intent, our inquiry necessarily begins with an analysis of the language of the statute. *Scholtens*, 173 Ill. 2d at 380. The language employed by Congress here could not be more clear. Section 4311(g) of the FBSA expressly provides:

> "[C]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. §4311(g) (1994).

If we are to give this provision its plain and ordinary meaning, as we must, Mercury Marine's compliance with the standard adopted by the Coast Guard, which was not to require propeller guards, clearly does not bar the common law tort claims asserted against it by Sprietsma in this case. Indeed, it is difficult to see how Congress' intention to preserve such tort claims could have been expressed any more explicitly.

The Supreme Court of Texas (*Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994)) and the Missouri Court of Appeals (*Ard v. Jensen*, 996 S.W.2d 594 (Mo. App. 1999)) have reached the same conclusion on similar facts: the FBSA does not preempt common law tort claims based on failure to install propeller guards. Although our appellate court took a contrary position in *Farner v. Brunswick Corp.*, 239 Ill. App. 3d 885 (1992), that case is premised on a narrow construction of section 4311, which cannot be justified given the broad language Congress employed when it drafted the statute. See *Ard*, 996 S.W.2d at 600. *Farner* should be overruled.

While allowing common law tort claims to go forward may seem to create a tension in the Coast Guard's policy against propeller guards, that is a circumstance we must assume Congress considered when it adopted section 4311(g). If section 4311(g) ultimately proves unworkable when applied as written, that is a matter for Congress and not this court to remedy.

For the foregoing reasons, the judgment of the appellate court affirming the dismissal of plaintiff's complaint should be reversed, and the cause should be remanded to the circuit court for further proceedings. I therefore dissent.

FOURTH DIVISION
APRIL 6, 2000

No. 1-99-0012

REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, Deceased,

Plaintiff-Appellant,

v.

MERCURY MARINE, a Division of BRUNSWICK CORPORATION, a corporation,

Defendant-Appellee.

Appeal from the Circuit Court of Cook County.

The Honorable Joseph N. Casciato, Judge, Presiding.

JUSTICE BARTH delivered the opinion of the court:

The plaintiff, Rex Sprietsma, as administrator of the estate of his deceased wife, Jeanne, filed this wrongful death action against *inter alia*, Mercury Marine, a division of Brunswick Corporation (Mercury), for the benefit of himself, the surviving spouse, and his son, Ross. Jeanne died after falling from a motor boat and being struck by the propeller blades of the boat's outboard engine. That engine was not equipped with a propeller guard.

Mercury moved to dismiss pursuant to section 2-619 (735 ILCS 5/2-619 (West 1998)), on the ground that the

common law tort claims on which Sprietsma's wrongful death action is based are preempted by provisions of the Federal Boat Safety Act (FBSA or Act) (46 U.S.C. § 4301 *et seq*. (1971)). The trial court granted the motion, this appeal followed, and we now affirm.

Background

a. Facts of this case

In July of 1995, plaintiff's decedent, Jeanne Sprietsma, was a passenger on board a motor boat. While the driver was in the process of making a right turn, Jeanne fell from the boat. Once in the water, she was repeatedly struck by the propeller blades of the boat's outboard engine. This caused her to suffer serious injury and resulted in her death shortly thereafter. The engine, designed by Mercury, was not equipped with a propeller guard.

Sprietsma filed a wrongful death action against, *inter alia*, Mercury to recover damages for the personal injuries of Jeanne, and for the loss of consortium suffered by both himself and his son Ross. Sprietsma's complaint alleged that Mercury's engine was defectively designed in that it was not equipped with propeller guards. Mercury moved for dismissal pursuant to section 2-619 (735 ILCS 5/2-619 (West 1998)) on the ground that Sprietsma's claims were preempted by the FBSA.

Finding that Sprietsma's cause of action was impliedly preempted by the FBSA, the trial court granted Mercury's motion to dismiss on November 20, 1998. The court included language in its order that it was final and appealable pursuant to Illinois Supreme Court Rule 304(a).

On appeal, Sprietsma contends that the trial court erred in granting dismissal, since the FBSA does not expressly or impliedly preempt state law tort claims based on the absence of a propeller guard. In support of his contention, Sprietsma asserts: (1) if Congress had intended to preempt common law claims, it would have explicitly done so in the FBSA's preemption clause; (2) even if the Act's preemption language ordinarily includes common law claims, the Act's savings clause alters this conclusion; (3) this court is required to apply a presumption against finding preemption; and (4) claims relating to propeller guards cannot be in conflict with federal law where there is no federal law on the subject.

b. The Federal Boat Safety Act

At issue is the construction of sections 4306 and 4311(g) of the FBSA, otherwise known as the preemption and savings clauses respectively. Section 4306 provides:

> "Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. § 4306.

And section 4311(g) provides:

> "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g).

The FBSA was enacted in 1971 in part to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of Transportation." See P.L. 92-75, Federal Boat Safety Act of 1971, S. Rep. No. 92-248, *reprinted in* 1971 U.S.C.A.N. 1333. To implement that goal, the Act grants the Secretary the exclusive authority to prescribe regulations establishing minimum safety standards for recreational boats. See 46 U.S.C. § 4302. To facilitate this duty, the Secretary has the option to delegate regulatory functions to a designated agency that operates under [his or her] supervision. See 46 U.S.C. § 4303(a). The United States Coast Guard has been designated as that agency. See 49 C.F.R. § 1.46(n)(1) (1996).

Pursuant to the Act, the Coast Guard must consult with the National Boating Safety Advisory Council (NBSAC) concerning the need for regulation in a given area and the extent to which proposed regulations will contribute to recreational boating safety. See 46 U.S.C. § 13110.

iii. Regulating the use of propeller guards

In 1988, the Coast Guard directed the NBSAC to examine the feasibility and potential safety advantages and disadvantages of propeller guards. The NBSAC appointed a

Propeller Guard Subcommittee for the purpose of reviewing and analyzing data relating to recreational boating accidents in which persons in the water were struck by boat propellers. See National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee (1989). The NBSAC also asked the Subcommittee to consider whether "the Coast Guard [should] move towards a federal requirement for some form of propeller guard." See Report of the Propeller Guard Subcommittee, at Appendix A.

After a year-long study and three different public hearings on the matter, the Subcommittee reached the unanimous conclusion that the "U.S. Coast Guard should take no regulatory action to require propeller guards." See Report of the Propeller Guard Subcommittee, Nov. 7, 1989, at 24. The Subcommittee determined that "[t]he development and use of devices such as 'propeller guards' can *** be counterproductive and can create new hazards of equal or greater consequence." See Report of the Propeller Guard Subcommittee, Nov. 7, 1989, at 23. Among other negative effects, propeller guards were found to have the potential to decrease an operator's ability to maintain control over the boat at "normal" speeds, increase the probability of striking an body in the water, and create a possibility of causing greater injury to those struck. See Report of the Propeller Guard Subcommittee, Nov. 7, 1989, at 23-24.

The Subcommittee's recommendation that no regulatory action be taken was accepted by both the NBSAC and the Coast Guard. See Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation, Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990).

Analysis

We review *de novo* the grant of a motion brought pursuant to 2-619. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill.2d 112, 116, 619 N.E.2d 732 (1993). The Supremacy Clause of the Constitution provides that "the laws of the United States . . . shall be the supreme Law of the Land *** any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Pursuant to the Supremacy Clause, Congress has the authority to preempt state law. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 90 L. Ed. 2d 369, 381, 106 S. Ct. 1890, 1898 (1986). "In determining whether Congress has preempted state law, our task is to discern congressional intent." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381-82, 119 L. Ed. 2d 157, 167, 112 S. Ct. 2031, 2036 (1992). A court interpreting a federal statute pertaining to a subject traditionally governed by state law (such as safety) will be reluctant to find preemption. *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 663-64, 123 L. Ed. 2d 387, 396, 113 S. Ct. 1732, 1737 (1993); *Weiland v. Teletronics Pacing Systems, Inc.*, 188 Ill. 2d 415, 416, 721 N.E.2d 1149 (1999). In fact, preemption will be found only in those situations where it is "the clear and manifest purpose of Congress." *CSX*, 507 U.S. at 664, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152 (1947). Federal preemption of state law can occur in three circumstances: (1) express preemption, where Congress explicitly preempts state law; (2) implied preemption where Congress has occupied the entire field (field preemption); and (3) implied preemption, where there has been an actual conflict between federal and state law (conflict preemption). *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 74-75, 110 S. Ct. 2270, 2275 (1990).

Preliminarily, we note that the second district of this court has considered the precise issue with which we are now presented in *Farner v. Brunswick Corp.*, 239 Ill. App. 2d 885, 607 N.E.2d 562 (1992). As in the case *sub judice*, the plaintiff in *Farner* filed suit after being injured by a propeller on a boat motor designed and manufactured by the defendant. *Farner*, 2239 Ill. App. 3d at 887. The trial court granted summary judgment in favor of the defendant manufacturer, finding that the FBSA preempted "plaintiff's claims insofar as they [were] based on a failure to provide a propeller guard." *Farner*, 239 Ill. App. 3d at 887. The second district affirmed, finding that the language of the Act expressly prohibited a common law damage action for failure to provide a propeller guard where the United States Coast Guard has made the decision not to require them. *Farner*, 239 Ill. App. 3d at 892-93.

Next, we acknowledge the well-settled proposition in Illinois that decisions of the federal courts interpreting a federal act, such as the FBSA, are controlling upon our state courts, "in order that the act be given uniform application." *See Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 383, 718 N.E.2d 172 (1999); *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 335, 662 N.E.2d 397 (1996); *Boyer v. Atchison, Topeka & Santa Fe Ry. Co.*, 38 Ill. 2d 31, 34, 230 N.E.2d 173 (1967). But see *Weiland*, 188 Ill. 2d at 423 (Illinois Supreme Court not bound by Seventh Circuit's interpretation of federal statute where the U.S. Supreme Court has not ruled on the question presented, there is a split of authority among the federal circuit courts of appeals, and court believes the case from the Seventh Circuit was wrongly decided).

I. Federal cases interpreting the FBSA

In *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir.

1995), the Eighth Circuit Court of Appeals considered the preemptive scope of the FBSA on facts similar to those before this court. There, the plaintiff was a boat passenger who sustained injury when she fell from the boat and was struck by the engine's propeller. *Carstensen*, 49 F.3d at 430. She filed suit, alleging that the boat's manufacturer was negligent for having failed to install a propeller guard. *Carstensen*, 49 F.3d at 430. The Eighth Circuit held that the plaintiff's claims were expressly preempted by the language of the FBSA's preemption clause, section 4306. *Carstensen*, 49 F.3d at 431. That clause provides, in relevant part:

> "[a] State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment safety standard or imposing a requirement for such equipment *** that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. § 4306.

Like Sprietsma, the plaintiff in *Carstensen* contended that the language of the FBSA's preemption clause fails to make explicit mention of common law actions, and thus Congress must not have intended to preempt them. The court responded by stating that while the language of the Act's preemption clause does not specifically refer to common law actions, it is very broad. *Carstensen*, 49 F.3d at 431-32. Such broad language, the court explained, "does not admit of [a] distinction between positive enactments and common law." *Carstensen*, 49 F.3d at 432 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522, 120 L. Ed. 2d 407, 426, 112 S. Ct. 2608, 2620 (1992)). Accordingly, the court concluded, the language used by Congress expressly indicates an intent to preempt all state laws or regulations that are not identical to a

regulation promulgated under the Act. *Carstensen*, 49 F.3d at 431. The Act does not contain a propeller guard regulation or requirement, and thus, by the explicit language of the preemption clause, states are forbidden from establishing one. This must mean, the court concluded, that common law damage actions are likewise forbidden since "[a]llowing a jury to assess damages for failure to install a propeller guard would create, in effect, a state requirement that guards be installed." *Carstensen*, 49 F.3d at 432. *See generally Cipollone*, 505 U.S. at 621 ("[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief"); and *Medtronic Inc. v. Lohr*, 518 U.S. 470, 509, 135 L. Ed. 2d 700, 730, 116 S. Ct. 2240, 2262 (1996) ("state common law damages actions do impose requirements and are therefore preempted where such requirements would differ from those imposed by [statute]") (O'Connor, J., concurring in part and dissenting in part).

As does Sprietsma here, the plaintiff in *Carstensen* pointed to the Act's savings clause, section 4311(g), arguing that its language alters the above analysis. The Act's savings clause provides:

> "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g).

Considering this argument, the court first looked to the legislative history of the savings clause and noted that its stated purpose "is to assure that in a product liability suit, mere compliance by a manufacturer with the Act will not be complete defense to liability." *Carstensen*, 49 F.3d at 432

(quoting S. Rep. No. 248 92nd Cong. 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 1333, 1352). The stated purpose of 4311(g), the court explained, offers guidance as to how to harmonize or balance the language of the preemption clause, which forbids states from imposing requirements not identical to those in the Act, with that of the savings clause, which appears to preserve at least some common law claims, but cannot be read to preserve those that would conflict with other sections of the Act. *Carstensen,* 49 F.3d at 432. The balance the court struck was not to interpret the savings clause as preserving common law claims for defectively designed products that are actually installed. *Carstensen,* 49 F.3d at 432.

Thus, for example, since the Act does not require that propeller guards be installed at all, there can be no cause of action against the manufacturer for failing to install them. However, since the Act does not prohibit manufacturers from installing propeller guards, those manufacturers who choose to install them would not be permitted to use compliance with the Act as a *per se* defense to claims that those guards are defective. *Carstensen,* 49 F.3d at 432. We note that several other courts which have interpreted the FBSA have reached an identical conclusion. *See, e.g., Moss v. Outboard Marine Corp.*, 915 F.Supp. 183, 187 (E.D.Cal. 1996) (FBSA savings clause has no application where manufacturer chooses not to install a propeller guard); *Shields v. Outboard Marine Corp.*, 76 [sic] F.Supp. 1579, 1581-82 (M.D.Ga. 1991) (same); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D.Ohio 1991) (boat manufacturer not liable for failure to install device it had a choice not to install, but analysis would look different if manufacturer chose to install defective product); *Farner v. Brunswick Corp.*, 239 Ill. App. 3d 885, 892 (2nd Dist. 1992) (same). See also *Mulhern v. Outboard Marine Corp.*, 146 Wis. 2d 604, 617 (Ct. App. 1988) (claims based on defective seat not

preempted by FBSA) and *Rubin v. Brutus Corp.*, 487 So.2d 360, 365 (Fla.Dist.Ct.App. 1986) (claims based on defective throttle not preempted).

Two years after the decision in *Carstensen*, the Eleventh Circuit Court of Appeals considered FBSA preemption of common law claims in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (1997). In *Lewis*, the parents of a woman who died after she was thrown from a boat and struck by its propeller brought suit against the manufacturer of the engine. *Lewis*, 107 F.3d at 1494. As in the instant case, the plaintiffs in *Lewis* alleged that the boat's engine was defective due to its lack of propeller guards. *Lewis*, 107 F.2d [sic] at 1494. The district court granted the defendant manufacturer's motion for summary judgment, finding that the plaintiff's claims were preempted by the FBSA, and the Eleventh Circuit affirmed. *Lewis*, 107 F.3d at 1494.

The *Lewis* court achieved the same result as *Carstensen*, i.e. dismissal of the common law claim, but its analysis differed. While *Carstensen* holds that common law claims are expressly preempted, the Eleventh Circuit based its finding of preemption on an implied rather than express preemption theory. *Lewis*, 197 F.3d at 1503. The court characterized its implied preemption analysis as a determination whether plaintiffs' claims "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and concluded that they did. *Lewis*, 107 F.3d at 1501 (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 131 L. Ed. 2d 385, 392, 115 S. Ct. 1483, 1487 (1995)).

We find the discussion in the *Lewis* opinion regarding the nature of FBSA preemption to be well-reasoned, but we nevertheless accept as determinative the Eighth Circuit's

analysis in *Carstensen*, and therefore hold that the FBSA expressly preempts common law claims for failure to install propeller guards. We note that a decided majority of the courts to have considered our issue have found express preemption. See e.g., *Farner v. Brunswick Corp.*, 239 Ill. App. 3d 885, 892 (2nd Dist. 1992) (section 4306 interpreted as a "specific expression of congressional intent to preempt a common law tort action); *Ryan v. Brunswick Corporation*, 557 N.W.2d 241 [sic], 551 (Mich. 1997) ("we join a long line of cases that have similarly held that common law *** actions alleging liability for failure to incorporate a propeller guard *** are expressly preempted under the FBSA"). Accord, *Moss v. Outboard Marine Corp.*, 915 F.Supp. 613, 615 (E.D.Cal. 1996); *Shields v. Outboard Marine Corp.*, 776 F.Supp. 1579, 1581, (M.D.Ga. 1991); *Shields v. Bayliner Marine Corp.*, 822 F.Supp. 81, 84 (D.Conn. 1993); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D. Ohio 1991).

II. FBSA preemption in light of
U.S. Supreme Court decisions

Because we hold that the FBSA expressly and explicitly preempts Sprietsma's claims, we do not consider whether implied preemption exists.[1] See *Cipollone*, 505 U.S. at 518 (when Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation).

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[1] Although the trial court found implied preemption, we are not bound by that conclusion, and may sustain the judgment on any ground warranted by the record. *People ex rel. Waller v. 1990 Ford Bronco*, 158 Ill. 2d 460, 463 (1994).

Although two federal circuits have construed the FBSA, the U.S. Supreme Court has not yet had occasion to do so.[2] Sprietsma directs this court's attention to *Freightliner Corp. v. Myrick*, 514 U.S. 280, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995), in which the Court construed the Vehicle Safety Act, 15 U.S.C.A. § 1381 *et seq.*, a similar, through [sic] by no means analogous statute. Sprietsma argues that the holding in *Myrick* prevents this court from finding preemption in the absence of a promulgated regulation with respect to propeller guards. Furthermore, according to Sprietsma, *Myrick* establishes a "stricter" preemption analysis, under which this court must find that his claims are not preempted. See *Moore v. Brunswick Bowling & Billiards*, 889 S.W.2d 246, 252 (Tex 1994) (finding early decisions construing the FBSA unpersuasive in light of the decision in *Myrick*).

Having carefully considered *Myrick*, we find that the facts and reasons in that case do not preclude a finding of preemption in this case, and in fact, support the determination that Sprietsma's state common law claims are preempted. See *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 296 (7th Cir. 1997) (holding plaintiff's product liability claims against windshield retention system manufacturer were preempted by the Vehicle Safety Act, and finding that *Myrick* supported this conclusion).

In *Myrick*, the Supreme Court considered whether common law claims based on the failure to install antilock

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[2] A petition for certiorari was granted in *Lewis* (522 U.S. 978, 139 L. Ed. 2d 337, 118 S. Ct. 439 (1997)) but we were informed by counsel at oral argument that the appeal was dismissed by agreement of the parties (523 U.S. 1113, 140 L. Ed. 2d 933, 118 S. Ct. 1793 (1998)).

brakes were expressly or impliedly preempted by the Vehicle Safety Act. *Myrick*, 514 U.S. at 282. The preemption clause in that act provided:

> "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard application to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard." 15 U.S.C.A. § 1392(d) (1982).

The plaintiffs in *Myrick* sued two different motor vehicle manufacturers, alleging that the absence of an antilock braking system in their tractor trailers constituted a negligent design defect. *Myrick*, 514 U.S. at 282. The defendant manufacturers responded that failure to install claims were preempted because the relevant agency had indicated its intent to regulate braking systems by promulgating a regulation on that subject. *Myrick*, 514 U.S. at 286. Although that regulation was subsequently struck down by the Ninth Circuit, the defendants argued it still had preemptive effect, since it demonstrated the agency's intent to forbid state regulation with regard to braking systems. *Myrick*, 514 U.S. at 286. The Supreme Court rejected the defendants' argument.

The Court pointed out that there was no evidence that the Vehicle Safety Act gave the relevant federal agency exclusive authority to issue safety standards. *Myrick*, 514 U.S. at 286. In fact, the Court explained that the preemption clause

in that act clearly implied that states could impose safety standards on auto manufacturers until the federal government came forth with a different standard. Therefore, under the Vehicle Safety Act regulatory scheme, the absence of regulation failed to have preemptive effect since, if there was no federal regulation on point, state law remained intact. *Myrick*, 514 U.S. at 286. Moreover, the Court pointed out, this was not a situation which the relevant agency had reached an authoritative decision not to regulate. *Myrick*, 514 U.S. at 286-87. Rather, the agency determined that a regulation was appropriate and even promulgated one, which was simply not in effect at the time of the lawsuit. *Myrick*, 514 U.S. at 287.

In contrast to section 1392(d) of the Vehicle Safety Act, section 4306 of the FBSA does not grant states the authority to regulate where the federal government does not. In fact, the language of the FBSA explicitly provides that states are forbidden from regulating *at all* unless there is an identical federal regulation. See 43 U.S.C. § 4306 (emphasis added). In this case, the agency granted rulemaking authority, the Coast Guard, investigated the possibility of promulgating a propeller guard regulation, and concluded that no such regulation was warranted. Accordingly, no such regulation was promulgated. The Supreme Court has held that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-52, 103 L. Ed. 2d 118, 135, 109 S. Ct. 971, 977-78 (1989). See also *Myrick*, 514 U.S. at 286-88 (acknowledging that this is especially true where congress intended to centralize all authority over the regulated area in one decisionmaker: the federal government).

Finally, we note that out of the thirteen courts that have considered FBSA preemption of common law claims based on lack of propeller guard, only two have ruled that the Act does not preempt such claims. See *Moore v. Brunswick Bowling & Billiards*, 889 S.W.2d 246 (Tex. 1994) and *Ard v. Jensen*, 996 S.W.2d 594 (Mo.Ct.App. 1999). We do not find those two state court pronouncements persuasive, particularly in light of the U.S. Supreme Court's holding in *Myrick*. Furthermore, we see in those opinions no basis for a departure from the decisions of every federal court to have considered the issue, or from this court's holding in *Farner*.

We are mindful of the presumption against a finding of federal preemption where the matter is one traditionally governed by state law, such as safety. However, in this case, we determine that the presumption has been overcome by the uniformity of the federal court decisions construing the FBSA. There is as yet no definitive ruling on the scope of preemption of state common law claims under the FBSA by the Supreme Court. That being the case, we believe our holding is buttressed by the inferences to be drawn from the Court's recent preemption analyses in *Myrick* and *Medtronic* as discussed above.

Conclusion

For the reasons stated herein, the trial court's order which dismissed Sprietsma's complaint as to Mercury is affirmed.

Affirmed.

HOFFMAN, P.J., and SOUTH, J., concur.

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

REX R. SPRIETSMA, Administrator
of the Estate of JEANNE SPRIETSMA,

v. No. 96-L 07812

MERCURY MARINE, a Division of
BRUNSWICK CORPORATION, et al.

ORDER

This case coming to be heard on the hearing of defendant Mercury Marine's Motion to Dismiss pursuant to 735 ILCS 5/2-619, due notice given; the Court being fully advised in the premises. It is hereby ordered that:

1. Attorney Daniel J. Connolly is admitted pro hac vice for purposes of this Motion;

2. Defendant Mercury Marine's Motion to Dismiss is granted;

3. Plaintiff's Motion For Rule 304(a) language is granted and the Court expressly finds that there is no just reason for delaying either the enforcement of or appeal of this order.

s/
Judge Joseph N. Casciato

November 20, 1998

February 1, 1990

Department of Transportation
United States Coast Guard

Mr. A. Newell Garden
Chairman, National Boating
Safety Advisory Council
20 Hunter Street
West Newton, MA 02165

Dear Mr. Chairman:

We have completed our review of the "Report of the Propeller Guard Subcommittee" which was approved by NBSAC on 7 November 1989. All of the report's recommendations are accepted. The recommendations will be implemented within resource limitations as outlined below:

NBSAC Recommendation 1. The U.S. Coast Guard should take no regulatory action to require propeller guards.

Coast Guard Position. The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

The Coast Guard will continue to collect and analyze accident data for changes and trends; and will promote increased/improved accident reporting as addressed in

recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art.

NBSAC Recommendation 2. The U.S. Coast Guard should, through improved accident reporting and analysis, develop a complete and comprehensive data base on underwater impact accidents. This should involve, as an integral part, U.S. Coast Guard involvement in the National Electronic Injury Surveillance System (NEISS) and the appropriate training of involved hospital personnel.

Coast Guard Position. There are several avenues to obtaining better accident data. The key is accident investigation. The Coast Guard has been promoting and assisting increased and improved state boating accident investigation for a number of years. Several Coast Guard initiatives have been applied including development of a comprehensive "Marine Accident Investigation Manual," an annual series of Boating Accident Investigation Seminars around the country, and installation of an accident investigation module at the Coast Guard's National Boating Safety Course for state personnel. The need for a closer look at boat and propeller strike accidents will be stressed in the training.

We intend to go beyond existing Coast Guard/state accident reporting channels. We have explored Coast Guard participation in the National Electronic Injury Surveillance Systems in the past and will take a renewed look at participation. Additionally, we are seeking proposals to improve accident reporting and analysis through our National Nonprofit Public Service Organization Grant Program. We are, for example, considering the use of college students to gather

hospital emergency room and clinic information on boating accidents.

NBSAC Recommendation 3. The U.S. Coast Guard should implement necessary steps to have included in national and state level educational and awareness campaigns the information regarding potential hazards associated with careless or negligent boat operation. Such programs should be on a continuing basis and be as vivid as possible in depicting underwater impact accident scenarios. These programs should state in a positive manner how such accidents can be prevented by diligent, informed boat operators.

Coast Guard Position. National educational campaigns have been aimed at the major causes and types of boating accidents and means of preventing and mitigating, e.g., need for education and PFD wear, drinking and boating problems, capsizing and falls overboard from small boats. More specific campaigns focused on hypothermia, problems associated with boat use for fishing and hunting, etc. While struck by boat and/or propeller accidents aren't among the major types of boating accidents, careless and negligent operation are major causes of boating accidents. Results and means of avoiding underwater impact accidents could effectively be interwoven into campaigns aimed at negligent operation. The Coast Guard will explore means and opportunities for doing and promoting this. A series of articles in our Boating Safety Circular will be developed aimed at avoiding boat/propeller strike accidents. Topics could include, for example, hazards, available propeller guards, warning labels, keeping people in the boat, avoiding bow and rail riding, avoiding swimming areas, etc.

NBSAC Recommendation 4. The U.S. Coast Guard should work with appropriate voluntary standards making

organizations (such as ABYC and SAE) to develop meaningful warning labels, and define their most effective locations, concerning the hazards of underwater impacts.

Coast Guard Position. The Coast Guard is soliciting for project proposals to do this through our National Nonprofit Public Service Organization Grant Program. If this mechanism is unsuccessful, we will approach ABYC and SAE regarding including warning label development in their respective work programs.

NBSAC Recommendation 5. The U.S. Coast Guard should review manufacturing safety standards of watercraft, emphasizing the importance of keeping passengers and operators in the boat, and maintaining the unobstructed fore and aft view of the boat operator.

Coast Guard Position: Improvements may be difficult to address through the regulatory process because of the need for quantitative justification and the vast array of boat configurations. The Coast Guard will make industry more aware of the considerations of adequate operator visibility and designs to facilitate keeping persons in the boat. Voluntary standards and design guidelines may be the only alternative to address this recommendation in a structured fashion.

NBSAC Recommendation 6. The U.S. Coast Guard should encourage a systematic review of current enforcement programs aimed at reducing boat accidents, and should provide all possible support to implement, maintain and expand those programs targeting the prevention of accidents.

Coast Guard Position. Enforcement is a major component of a boating safety program. Initially, the Coast Guard will address

this recommendation through guidance to and feedback from the states associated with the allocation and use of state financial assistance, also, the Coast Guard's National Boating Safety Course for state personnel. We will ask NASBLA to task its Law Enforcement/Uniform Boating Laws Committee with a review of enforcement programs.

Mr. Chairman, NBSAC members have handled this difficult and controversial task in an even-handed and professional manner. I want to commend you for your continuing leadership of the Council and the members of the propeller guard subcommittee for their fine work. Please pass my thanks to all the Council members for their work on behalf of safe boating.

Sincerely,

s/

ROBERT T. NELSON
Rear Admiral, U. S. Coast Guard
Chief, Office of Navigation Safety
and Waterway Services